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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 425

SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal from the United States District Court for the Middle District of Florida

APPELLANTS' REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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1. The Solicitor General,[1] on behalf of the United States, has now confessed error on the part of the District Court. While we must note our disagreement with many of the Solicitor General's observations concern-

[1] The Assistant Attorney General in charge of the Antitrust Division joined in the Solicitor General's memorandum.

ing the respective roles of the Commission and the courts in a rail unification proceeding,[2] we nonetheless welcome this acknowledgement of the clear error of law on the part of the District Court which we sought to set forth in our Jurisdictional Statement. We note that thus the United States, the Interstate Commerce Commission, and the carriers proposing the merger are all in agreement as to the error of law committed by the District Court, and that its judgment should not stand.

2. In our Jurisdictional Statement we urged the Court to give plenary consideration to this case at this juncture, with a view toward reinstatement by this Court of the Commission's orders. (J.S. No. 425, pp. 4-5, 29) We still believe that such a disposition, after

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[2] Perhaps the basic source of error in these observations is suggested by the Solicitor General's statement that the "ultimate question" in judicial review is "whether the merger would be consistent with the public interest because the foreseeable benefits to the public outweighed the foreseeable injury to competition." (U. S. Memo, p. 4) With all due respect, the ultimate resolution of the public interest factors here is a matter which has been entrusted to the Commission. The role of the courts is to determine, upon appropriate challenge, whether the Commission's findings are supported by substantial evidence; whether it committed any definable error of law; and whether the result it reached is one within its statutory powers.

Similarly, the Solicitor General states that certain "distinguished students of transportation policy" might take a different view from that of the Commission as to the proper role of competition in "fostering efficient and aggressive transportation service." (U. S. Memo, p. 6) But the point is that the members of the Commission have been appointed by the President and confirmed by the Senate to exercise the quasi-legislative powers of resolving these factors in the public interest, not these students. Moreover, as we developed in our Jurisdictional Statement, the affirmative fostering of rail unification is a matter of direct congressional policy, and has been such for 45 years.

plenary review by the Court, would be an appropriate one. This is because, once the District Court's erroneous holding as to the effect of Section 7 is put aside, the remaining questions as to the Commission's resolution of the competitive factor presented by the merger, in its overall determination as to the public interest, clearly and demonstrably relate to matters which have been entrusted by Congress to the Commission for resolution—as is established by this Court's holdings in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959).[3]

On any plenary review of this appeal we believe that our demonstration of the incorrectness of the District

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[3] The particular questions raised by the Southern illustrate this. After considerable abstract discussion of the issues, the Southern's motion finally comes to Southern's two private projects: its attempt to acquire trackage rights from the merged carrier in central and western Florida and its attempt to require the merged carrier to divest itself of the L & N. (Southern Motion, pp. 17-25) The Southern's quarrel here is that instead of adopting its proposed solutions to whatever problems would be created by the merger in two specific respects—namely, the rail transportation situation in central and western Florida and the control by the merged carrier of the L & N—the Commission adopted other solutions. Specifically, it adopted the Jacksonville Gateway condition (Condition No. 8) as an effective device to make rail competition available on traffic from central and western Florida; and through another condition (Condition No. 12) it strengthened the retaliatory position of the Illinois Central and the Gulf, Mobile and Ohio, as a counterbalance to the merged carrier's control of the L & N. The choice of these solutions—using techniques that an expert administrative body uniquely has the capability for evaluating and the power of applying—was obviously within the Commission's powers. Moreover, the use of these techniques belies the general insinuation of the appellees that the Commission somehow considered competition in the abstract and did not take specific competitive problems in hand.

Court's ruling would also necessarily involve demonstration of the consistency of the Commission's treatment of the competitive factor with the established principles laid down by this Court.[4] Thus a final and authoritative decision on the Commission's treatment of the competitive factor could be rendered by this Court, as a guide in the other major unification cases before the Commission.[5]

Moreover, in the interest of resolving this already long drawn-out case, we would present the two incidental issues in this case—as to the labor protective conditions and as to the status of Mercantile-Safe Deposit and Trust Company—to the Court, if probable jurisdiction is noted, and urge their resolution. The suggestions of certain of the private appellees in this case that this Court is without jurisdiction to review

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[4] The issues presented to the District Court were not complex; nor would be the issues presented to this Court on the plenary review which we urged in our Jurisdictional Statement. This is demonstrated by the relative shortness of the main briefs of the appellees in the District Court, which expanded upon *all* the contentions as to which they urged that the Commission's orders should be set aside. The FEC's brief comprised 72 typewritten pages, a considerable number of which were spent in its successful efforts to induce the District Court to commit what the Solicitor General now concedes to be an error of law. The RLEA brief covered 48 pages, all devoted to the issue of the labor protective conditions. The brief of the United States covered 57 typewritten pages, and that of the Southern 39 pages.

[5] These unification cases are listed in the Commission's Jurisdictional Statement in No. 555, p. 19. In addition, in another major proposal, the Norfolk and Western Railway Company and the Chesapeake and Ohio Railway Company on October 11, 1965 filed with the Commission seeking unification. ICC Finance Dkt. No. 23832.

these issues are, of course, plainly without merit.[6]— Should the Court note probable jurisdiction in this appeal, we would, as we stated in our Jurisdictional Statement, urge all the issues necessary to reinstatement of the Commission's orders.[7]

3. Nonetheless, in the interest of promptly disposing of this appeal and permitting the District Court to perform the proper functions of a reviewing court in a rail unification matter as taught by *McLean* and *Minneapolis,* we acquiesce in the suggestion of the Solicitor General that this Court summarily correct the

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[6] The suggestion of Southern (Southern Motion, p. 7) that reviewing all the issues in this case would involve the exercise of "original jurisdiction" by this Court must be metaphorical. This case is, in substance and form, an appeal from the judgment of the District Court, and involves the exercise of this Court's appellate jurisdiction. On appeal, certainly it is within this Court's power to order the District Court to enter any judgment which the District Court might itself have entered—*e. g.,* an order dismissing the complaints herein. *Cf. United States* v. *Parke, Davis & Co.,* 365 U.S. 125 (1961); *Kiefer-Stewart Co.* v. *Jos. E. Seagram & Sons, Inc.,* 340 U.S. 211, 214-15 (1951); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555 (1931).

The suggestion by two of the private appellees (Southern Motion, p. 7; RLEA Motion, p. 5) that this Court expressly exclude certain issues from its notation of probable jurisdiction is unprecedented. It appears to proceed from false analogy to the Court's practice, on occasion, of granting writs of certiorari limited to certain issues. This is a derivative of the fact that the certiorari jurisdiction is a discretionary one. See Stern & Gressman, *Supreme Court Practice* (3d ed. 1962), pp. 184-85. This Court's jurisdiction on appeal, on the other hand, is an obligatory one once a substantial question is disclosed.

[7] Our "Motion To Expedite Submision Of The Case If Probable Jurisdiction Is Noted," filed October 11, 1965, suggests procedural methods of ensuring the availability of this case for plenary submission to the Court at an early date.

error of the District Court. On this approach, the case would be remanded to the District Court with specific directions to make a review of the propriety of the Commission's decision, applying proper judicial review standards in a matter of this sort as taught by this Court's decisions in *McLean* and *Minneapolis,* and putting aside the erroneous standard embodied in the District Court's decision of May 13, 1965.

CONCLUSION

The various motions of the private appellees to affirm or dismiss are manifestly frivolous and should be denied. While we suggest the notation of probable jurisdiction so that the Court may pass in plenary fashion on all the challenges made below to the Commission's orders, we acquiesce in the Solicitor General's suggestion that the judgment of the District Court be summarily corrected. That judgment should be reversed, and the case remanded to the District Court with instructions to review the propriety of the Commission's orders in this matter, under the proper standards for judicial review in a rail unification matter as

taught by this Court's decisions in *McLean* and *Minneapolis*.

Respectfully submitted,

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